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IN THE

Supreme Court of the United States

October Term, 1967

No. 188

PAN CARGO SHIPPING CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL AND REPLY BRIEF OF PETITIONER, PAN CARGO SHIPPING CORP.

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The national importance of the subject matter—the Arab League boycott of American flag vessels which have traded with Israel—has been highlighted by the resumption of the Arab-Israeli War in June, 1967, subsequent to the filing of the Petition herein.

After service of the Government's Brief, Petitioner's attention was called to Public Law 89-63, § 3(a), 79 Stat. 209 (1965), as amended, 50 U. S. C. App. § 2022(4), wherein the boycott was condemned in the following language:

> "The Congress further declares that it is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States and (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade

practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States."

That this statement of national policy was directed at the Arab League boycott of Israel and American and other firms trading with Israel is plain from its legislative history, which will be found in the following publications:

1. 1965 U. S. Code Cong. and Adm. News, pp. 1826, 1829-30;
2. Report of the Hearings before a Senate Subcommittee on Banking and Currency, 89th Cong., 1st Sess., held May 24 and 25, 1965, on S. 948 (a Bill to Amend Section 2 of the Export Control Act of 1949), U. S. Government Printing Office, 1965 [47-789];
3. Report of the Hearings before the House Committee on Banking and Currency, and its Subcommittee on International Trade, 89th Cong., 1st Sess., held May 5, 13, 20 and 21, 1965, on H. R. 7105 (a Bill to Provide for Continuation of Authority for Regulation of Exports, etc.), and on H. R. 627 and H. R. 4361 (Bills to Amend the Export Control Act of 1949), U. S. Government Printing Office, 1965 [48-042];
4. House Report No. 434, 89th Cong., 1st Sess., U. S. Government Printing Office [35-006-65-1];
5. Senate Report No. 363, 89th Cong., 1st Sess., U. S. Government Printing Office [35-010].

The Vessel's "Readiness to Load"

The Government has not questioned Petitioner's statement with respect to the national importance of the problem (Petition, p. 11); its Brief in Opposition to the Petition

is confined to the questions whether the NATIONAL PEACE was "ready to load" at Ras Tanura, and whether that port was a "safe port" within the meaning of the Charter. On the first point, it argues that the Vessel was not "ready to load" by the cancelling date because "free pratique" had not been obtained by then, citing two old British decisions, *White* v. *The Steamship "Winchester" Co.*, 23 Scottish L. R. 342 (1886) and *The Austin Friars*, 71 L. T. Rep. 27 (1894).

The argument is fallacious. The soundness of the cases cited is questionable, but in any event we are here concerned, not with a charter worded as were those there involved, but with one specifically providing that laytime was to commence the moment the Vessel was moored at her loading berth.

"Free pratique" is not the issue here; it is whether or not a vessel chartered to an Agency of the United States is "ready to load" under this form of charter when she arrives at her loading berth in an Arab League port to which she has been ordered by the Agency if, as events prove, there then exists the possibility (however remote) that her loading may subsequently be delayed by the invocation of the so-called Arab League boycott.

By acting with such unseemly haste and throwing up the Charter as soon as the cancelling date was reached, an Agency of the United States lent its support to a boycott which Congress has since expressly declared it is the public policy of the United States to oppose.

It is true that the express declaration by Congress was made after the incident. This does not mean, however, that Congress thereby changed the national policy. At least insofar as the Arab League boycott affected American shipping, the statute was in effect simply a restatement of the traditional American policy of freedom of the seas.

The "Safe Port" Question

Petitioner believes that several erroneous and misleading statements contained in the Government's Brief are of sufficient significance to warrant their being called to the Court's attention.

The Government states (Brief, p. 2) that "an agreement was reached that petitioner would carry 'a full load of Navy Special Fuel Oil from Bahrain or Ras Tanura for discharge at Manila.'"

This statement is simply not true. The words quoted by the Government do *not* appear in the agreement; they are taken from the loading order [Pan Cargo Exh. 6] issued by MSTS for the first voyage to be made pursuant to the agreement. The agreement (*i.e.*, the Charter [Pan Cargo Exh. 4]) makes no mention of "Navy Special Fuel Oil" or of Ras Tanura; it provides for the loading of "black" petroleum products at one or more "safe ports" in the Persian Gulf to various discharging ports in the Pacific.

Contrary to the Government's contentions (Brief, pp. 2 and 8), the fact that the word "safe" did not appear in the brief "Invitation to Bid" [Pan Cargo Exh. 2], but was added by the broker when he prepared the formal Charter, is of no significance whatever. The Government has failed to point out that its own Contracting Officer conceded that if the word "safe" had not been included in the Charter it would have been implied. (R. 726).

There is present no ambiguity in the formal Charter evidencing the parties' agreement, in which all prior negotiations were of course merged. "Safe," as used to describe "ports" and "berths" in charter parties, is a word of art, and its omission in a charter of this kind would be unthinkable. No shipowner of any competence would ever agree to send his vessel to whatever port within the load-

ing range the charterer might select, whether or not it was "safe" for the chartered vessel. The omission of the word "safe" from the "Invitation to Bid" is of no greater significance than the omission of the articles "the" or "an" would have been.

The terms of the agreement were, as the District Court found, "all understood at the date of the fixture [*i.e.*, the making of the agreement] and the rights of the parties are governed by the written charter party embodying these terms." See Opinion of the District Court, Appendix D to the Petition, p. 13a.

The Government argues (Brief, pp. 7-8) that "when a charter names a port, and the master proceeds there without protest, the owner accepts the port as a safe port, and is bound to the conditions that exist there," and states that "That is the case here."

The statement is erroneous. As pointed out above, the Charter did *not* name Ras Tanura, or any other loading port. It simply provided for loading at one or more safe Persian Gulf ports, and it was up to MSTS to select one or more such ports which were safe for the NATIONAL PEACE.

Cases such as *The Maggie Moore,* 8 Fed. 620 (C. C. Md.), have no application where there is no knowledge of the unsafe condition, and here there was none. If Petitioner had anticipated trouble at Ras Tanura, it would never have permitted MSTS to change its mind and order the Vessel to load a full cargo at an Arab League port (Ras Tanura) after having already exercised its option by nominating Bahrain, which was not a member of the League, and where the NATIONAL PEACE could presumably have loaded without difficulty.

Petitioner's primary contention is that Ras Tanura *was* a safe port for the NATIONAL PEACE, because from all that appears she could have been loaded there without

such delay as would have amounted to a frustration of the Charter. Its secondary contention is that if she could not have been loaded there without such delay, then it was not safe for the NATIONAL PEACE, and MSTS should have nominated another Persian Gulf loading port.

Respectfully submitted,

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